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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

United States of America,

Petitioner,

vs.

X-Citement Video, Inc., and Rubin Gottesman,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief for the States of Ohio, Alaska, Hawaii, Illinois, Michigan, Montana, Nevada, North Carolina, Pennsylvania, South Dakota, Territory of the Virgin Islands, Virginia and Wisconsin as Amici Curiae in Support of Petitioner

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INTEREST OF THE AMICI CURIAE

The States that have joined this brief as amici curiae are directly engaged in the continuing battle to prevent the sexual exploitation of minors. These efforts include the prosecution of child sexual abuse cases, the protection and encouragement of children who are willing to report and give testimony in such matters, and the initiation of civil and criminal actions to combat the interstate and intrastate production and distribution of child pornography materials. The amici States bring numerous civil actions and obtain many criminal convictions each year in these areas, which often require them to defend their own statutes against constitutional challenges similar or identical to those raised in this case.

The direct interest of the amici States in the proper interpretation and application of the First Amendment to cases involving child pornography is demonstrated by the fact that the leading decisions in this area include cases involving the States as well as cases involving the Federal government. *See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982). Although the issues raised in this case begin with the proper interpretation of a federal statute, they also encompass the constitutional boundaries that inform and restrict the permissible interpretation and application of all statutes — both federal and state — directed against trafficking in child pornography. As such, these issues are of direct interest to the amici States.

Moreover, even the matter of the proper interpretation of this federal statute presents an issue of direct interest to the States, for two reasons. First, the continuing battle against trafficking in child pornography is being pursued through the complementary and cooperative law enforcement efforts of the States and the Federal government, aimed at both the intrastate and interstate components of such traffic. Second, the successful prosecution of those who willingly distribute child pornography materials for profit, whether such convictions are attained under federal law or state law, is of immediate importance to the States, since almost all

such criminal traffickers are citizens of one or another State and since their activities are inimical to the public welfare in all the States affected by such unlawful trafficking.

For all of these reasons, the amici States are deeply concerned about the issues raised in this case and urge that this Court should reverse the erroneous decision of the Ninth Circuit.

ISSUE PRESENTED

Whether the court of appeals correctly held that 18 U.S.C. §2252, which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face on the ground that it does not require the government to prove that the defendant knew that the materials at issue show minors engaging in sexually explicit acts.

SUMMARY OF ARGUMENT

The court below erred in two respects: as a matter of statutory interpretation and as a matter of constitutional law. The federal statute at issue here, 18 U.S.C. §2252, does not require those who traffic in visual depictions of sexually explicit conduct by minors to know the age of any such minor performers. Neither the statute itself nor its legislative history requires such an interpretation. Instead, the statute is properly construed to require a mens rea of recklessness concerning the age of such minor performers, which is consistent both with applicable canons of construction and with the legislative history available here.

The First Amendment does not require those who traffic in child pornography materials to know the age of any minors whose sexual conduct is depicted in the materials. Instead, criminal statutes aimed at trafficking in child pornography are constitutional if they require that the defendant know the character and nature of the materials distributed and are reckless as to whether the materials contain visual depictions of sexually explicit conduct by minors. But mistake

of age is not constitutionally required to be made a defense to prosecution under state and federal laws designed to protect children against sexual abuse and exploitation. If any such restrictive standard were imposed as a constitutional requirement, then state and federal efforts to curb trafficking in child pornography would be severely damaged; as long as traffickers went about their business with nothing more than a conscious disregard for the nature of child pornography materials, and did not inquire specifically about the precise age of any youthful-looking performers, then it would be impossible to prosecute them for their distribution of such materials. No such absurd result is compelled either by the First Amendment itself or by this Court's prior decisions applying it to criminal laws against child pornography.

ARGUMENT

The Court of Appeals for the Ninth Circuit held that 18 U.S.C. §2252 contained no mens rea requirement whatsoever concerning the age of minor performers whose sexually explicit conduct is portrayed in child pornography materials. Pet. 9a-11a. It also concluded that the First Amendment requires a defendant to have actual knowledge that at least one of the performers is under age 18. *Id.* 14a-15a. Putting the two together, the court thus found the statute to be unconstitutional. Both conclusions, however, are in error.

I. 18 U.S.C. §2252 IS PROPERLY CONSTRUED TO REQUIRE A MENS REA OF RECKLESSNESS CONCERNING THE AGE OF MINOR PERFORMERS BY THOSE WHO TRAFFIC IN VISUAL DEPICTIONS OF SEXUALLY EXPLICIT CONDUCT BY MINORS.

The federal statute at issue here authorizes a felony conviction for any person who "knowingly transports or ships" or "knowingly receives, or distributes," or "knowingly reproduces . . . for distribution" in interstate or foreign commerce "any visual depiction" whose production "involves the use of a minor engaging in sexually explicit conduct" and which depicts "such conduct." 18 U.S.C.

§2252(a)(1) & (2). The evident grammatical structure of this provision is that the adverb "knowingly" modifies each of the verbs contained in the statute — "transports," "ships," "receives," "distributes," and "reproduces" — but none of its other language. If a defendant "knowingly" performs any of these acts with respect to the kinds of materials described — *i.e.*, materials containing a visual depiction of sexually explicit conduct engaged in by a minor — then he may be convicted under the express terms of the statute. The bare language of the statute does not appear to require, however, that the defendant have actual knowledge that one or more of the performers whose sexually explicit conduct is depicted in those materials is in fact a minor, as several courts have held. *See, e.g., United States v. Thomas*, 893 F.2d 1066, 1070 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990); *United States v. Langford*, 668 F.2d 1088, 1089 n.1 (7th Cir.), *cert. denied*, 461 U.S. 959 (1982); *United States v. Kleiner*, 663 F. Supp. 43, 44 (S.D. Fla. 1987); *United States v. Tolczeki*, 614 F. Supp. 1424, 1429 (N.D. Ohio 1985). The same conclusion has also been reached about 18 U.S.C. §2251, which is a companion provision to this statute. *See, e.g., United States v. United States Dist. Ct.*, 858 F.2d 534, 537-38 (9th Cir. 1988).

Were it not for the possible constraints of the First Amendment in this area, the interpretation reached by the courts cited above would be dispositive, without more. In cases involving physical offenses against minors, for example, it is well settled that strict liability can be imposed for crimes such as statutory rape.[1] This Court has held, however, that the First Amendment provides some protection even for those materials that can be classed as child pornography, and thus that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *New York v. Ferber*, 458 U.S. 747, 765 (1982); *cf. Smith v. California*, 361 U.S. 147, 152- 55 (1959) (holding that "all mental elements" cannot constitutionally

[1] *See, e.g.*, Ohio Rev. Code §2907.02(A)(1)(b) (offense of rape includes sexual conduct with a minor "less than thirteen years of age, whether or not the offender knows the age of such person").

be eliminated from the crime of dealing in obscene materials); *Hamling v. United States*, 418 U.S. 87, 123 (1974) (holding it constitutionally sufficient if the defendant "had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials" under law banning distribution of obscene materials). It is for this reason that the Ninth Circuit, once it had construed the statute at issue here to contain no mens rea requirement at all concerning whether any minor's sexually explicit conduct is depicted in the offending materials, went on to nullify this statute as unconstitutional.

Yet this grammatical analysis of 18 U.S.C. §2252 is not the end of the inquiry by any means, and this constitutional analysis is suspect. Instead, the statute is properly construed to require a mens rea of recklessness concerning the age of such minor performers, which is consistent both with applicable canons of construction and with the legislative history available here.

In *Osborne v. Ohio*, 495 U.S. 103 (1990), for example, this Court provided a model for the correct analysis of such statutes. The case concerned the constitutionality of a state criminal law that prohibited the possession or viewing of child pornography materials. The state law itself, like the federal statute at issue here, did not contain explicit guidance about the proper mens rea provision. *See* Ohio Rev. Code §2907.323(A)(3). The Ohio Supreme Court, however, had ruled that it must import a mens rea of "recklessness" into the child pornography law. *Id.* at 115; *see State v. Young*, 37 Ohio St. 3d 249, 252-53 (1988). It did so by applying the State's residual statute, which provided that where a statute "neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." Ohio Rev. Code §2901.21(B).[2] This

[2] This residual statute is a codification of traditional principles of criminal law set forth in the Model Penal Code. *See* Model Penal Code §2.02(3), comment 5 n.36 (Proposed Official Draft 1962 and Revised Comments 1985).

Court upheld the statute as so construed against the defendant's claim that it violated his rights under the First Amendment. 495 U.S. at 113 n.9.

The same problem is presented in this case: whether a statute that punishes various actions involving materials that visually depict sexually explicit conduct of a minor can be construed to require any particular mens rea about whether any of the persons so depicted is indeed a minor. In *Osborne*, this Court explicitly approved the constitutionality of such a procedure whereby the courts may render a narrowing construction of child pornography laws to satisfy any constitutional requirements as to mens rea. 495 U.S. at 115. The same kind of narrowing construction has been adopted when applying statutes in other areas as well. *See, e.g., Liparota v. United States*, 471 U.S. 419, 426 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422, 444 (1978).

In determining whether any such mens rea should be imported into 18 U.S.C. §2252 and, if so, what mens rea is proper, this Court does not have available an explicit residual statute such as the Ohio Supreme Court applied in *Osborne*. Nonetheless, traditional methods of statutory construction employed by this Court provide guidance that is just as effective here. In the absence of any such legislative directive, this Court should continue to apply the standard principles that have been recognized and applied by the courts in previous decisions.

First, this Court has imported appropriate mens rea into other federal criminal statutes by referring to principles of the common law and to the general provisions of the Model Penal Code. *See, e.g., Liparota*, 471 U.S. at 423-27 (relying on the "background assumption[s] of our criminal law" to determine the proper mens rea requirement); *Morissette v. United States*, 342 U.S. 246, 250 (1952) (observing that the requirement of some mental state for criminal responsibility is "universal and persistent in mature systems of law"). Applying those principles, for instance, this Court has held that "criminal offenses requiring no mens rea have a

'generally disfavored status.' " *Id.* at 426 (quoting *United States Gypsum Co.*, 438 U.S. at 438).[3] These same principles indicate that "recklessness" constitutes the proper mens rea under 18 U.S.C. §2252 for the particular element of whether any persons whose sexually explicit conduct is depicted in the offending materials is actually a minor.

As the court below noted, and as is plain on its face, this statute does impose a mens rea of "knowledge" with respect to the transportation, shipping, receipt, distribution, and reproduction of child pornography materials. The issue is simply what mens rea is intended to be or should be applied to the distinct element of this crime that those materials must visually depict "a minor engaging in sexually explicit conduct." Pet. 13a-15a. Under the Model Penal Code, the baseline mens rea for any material element of a crime not otherwise specified by the legislature is "recklessness." *See* Model Penal Code §2.02(3) (Proposed Official Draft 1962 and Revised Comments 1985). As the commentary elaborates, this approach "accepts as the basic norm what is usually regarded as the common law position. More importantly, it represents the most convenient norm for drafting purposes." *Id.* comment 5 & n.35. Moreover, this baseline position reflects the "background assumption of our criminal law," *Liparota*, 471 U.S. at 426, that awareness of risk, which creates both moral blameworthiness and the potential for deterrence, represents the basic foundation that should underlie criminal culpability:

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[3] The Court has indeed recognized that Congress has the power to create strict liability crimes whenever it judges them to be appropriate. *See, e.g., United States Gypsum Co.*, 438 U.S. at 437-38. Given the language and legislative history of this law, however, the amici States do not contend that Congress intended to impose strict liability here on the issue of whether any of the persons whose sexually explicit conduct is depicted is actually a minor. Thus, the Court need not decide in this case whether strict liability as to this particular element, or indeed any lesser mens rea than recklessness, is constitutionally permitted, as amici would contend. *See also infra* note 5.

> The distinction, one of the most critical to criminal law, between negligence and all three higher levels of culpability, reflects that a defendant acting purposely, knowingly, or recklessly is aware of the harmful consequences that may result and is therefore both blameworthy and deterrable, but a defendant acting negligently is unaware of harmful consequences and therefore is arguably neither blameworthy nor deterrable. . . . For this reason, recklessness is considered the norm for criminal culpability . . .

P. Robinson & J. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 695-96 (1983) (cited in *Liparota*, 471 U.S. at 423 n.5). Courts have therefore held that this traditional mens rea should be imported into criminal statutes unless some obvious reason appears on the face of the statute not to do so. *See, e.g., State v. Lima*, 546 A.2d 770 (R.I. 1988).

As a matter of statutory construction, the only realistic alternative here to adopting this standard mens rea under the common law and the Model Penal Code is to apply the adverb "knowingly" to every element of this statute. There is some support for this approach under the Model Penal Code also. *See id.* §2.02(4) & comment 6. However, the drafters of the Model Penal Code noted that the simple mention of a mens rea requirement with respect to one element of a crime often is not intended to extend to all elements of the same crime, and where there is ambiguity, "recklessness should suffice in the absence of special provision to the contrary." *Id.* This Court has also embraced this preferred "elements" approach, observing that the "required mental state may of course be different for different elements of a crime." *Liparota*, 471 U.S. at 423 n.5 (citing cases); *see also* P. Robinson & J. Grall, *Element Analysis, supra* (explaining the proper basis for independent analysis and construction of the mens rea appropriate to

each element of a crime).[4]

A further command of statutory construction is pertinent here also. For if such a saving construction of this statute is "fairly possible," then this Court has repeatedly held that the courts have a duty to construe the law so as to preserve its constitutionality. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing cases and restating this duty by holding that it applies unless any such interpretation "is plainly contrary to the intent of Congress"). In view of the statements made by this Court in *Ferber*, which might at least appear to rule out strict liability for any elements of the crime of child pornography, the courts should carry out their obligation to save the constitutionality of 18 U.S.C. §2252 by importing a recklessness mens rea into the statute, as urged by the dissenting judge below. Pet. 23a-28a & n.6. Such an interpretation is not only "fairly possible" here, but indeed is the most defensible construction of this statute.

In *Liparota*, this Court also indicated that the legislative history of a statute is a proper source for divining the proper mens rea to read into its provisions. 471 U.S. at 425, 430 & n.13. Here the legislative history of this statute is in accord with the reading set forth above. This section was originally put forward as an amendment to a bill that eventually was enacted as the Protection of Children Against Sexual Exploitation Act of 1977. The amendment was sponsored by Senator Roth. During floor debate on the proposal, Senator Percy explained that the term "knowingly" did not require

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[4] As Petitioner has pointed out, the practical differences between a mens rea of recklessness and one of knowledge are diminished by the fact that the courts construe the "knowing" standard to encompass instances of "willfull blindness," Pet. 11 n.4, and have upheld the "ostrich instruction" in defining "knowingly." *See, e.g., United States v. Kehm*, 799 F.2d 354 (7th Cir. 1986). Yet the Justice Department stated at the time this statute was enacted that it could pose "difficult problems of proof" if it were interpreted to require a showing that the defendant actually knew that one or more of the persons whose sexually explicit conduct was depicted is in fact a minor, as shown in the discussion, *infra*, in the text of this section.

that the trafficker must have actual knowledge that minors were depicted, and instead only a minimum standard of recklessness was intended. 123 Cong. Rec. 33,050 (1977) (trafficker "must have either, first, actual knowledge that the materials do contain child pornography depictions or, second, circumstances must be such that he should have had such actual knowledge," but mere negligence would not suffice for a conviction). Senator Roth agreed with this explanation, stating that it was "absolutely correct." *Id.*

Moreover, the Senate Committee report on this legislation contains a letter from then-Assistant Attorney General Patricia M. Wald to Senator Eastland, who was then the Chairman of the Senate Judiciary Committee. In the letter, the Justice Department identified as one of its principal concerns that the bill as drafted could pose "difficult problems of proof," since "in a great many cases the age of the subject will not be readily apparent from an observation of the film or photograph." S.Rep. No. 438, 95th Cong., 1st Sess. 28 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 63. The Justice Department thus made two suggestions that were adopted by Congress in enacting the legislation.

First, the Justice Department suggested that the word "knowingly" should be stricken altogether from 18 U.S.C. §2251, to avoid any interpretation "requiring the Government to prove the defendant's knowledge of everything that follows 'knowingly,' including the age of the child." *Id.* at 29, 1978 U.S.C.C.A.N. at 64. "We assume that it is not the intention of the drafters to require the Government to prove that the defendant knew the child was under age sixteen but merely to prove that the child was, in fact, less than age sixteen." *Id.*

Second, the Justice Department suggested that the word "knowingly" be retained in 18 U.S.C. §2252 to make it "clear that the bill does not apply to common carriers or other innocent transporters who have no knowledge of the nature or character of the material they are transporting." *Id.* The Department remained concerned, however, about the proof problems that it had just identified, and suggested that to

"clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved." The Justice Department thus concluded that with these changes, the government would be required to prove "that the defendant knew, had reason to know, or intended that" the materials visually depicted sexually explicit conduct by a minor," *id.* at 28, 1978 U.S.C.C.A.N. at 64, which is a classic formulation of a baseline "recklessness" mens rea requirement. *Cf.* Model Penal Code §2.02(3) (baseline of recklessness includes knowingly, recklessly, or purposely).

Congress did in fact remove the term "knowingly" from the final version of 18 U.S.C. §2251, and expressly incorporated the Justice Department's letter into the Senate Committee report on the bill. There is no apparent basis for concluding that the Congress intended to ignore the concerns expressed by the Justice Department and create "difficult problems of proof" identical to those the Department expressly cautioned Congress to avoid. All such concerns, in addition to any potential constitutional concerns, are eliminated by simply reading 18 U.S.C. §2252 as sensibly applying a mens rea of recklessness to the element of whether the offending materials depict sexually explicit conduct by a minor.

II. CRIMINAL STATUTES AIMED AT TRAFFICKING IN CHILD PORNOGRAPHY ARE CONSTITUTIONAL IF THEY REQUIRE THAT THE DEFENDANT KNOW THE CHARACTER AND NATURE OF THE MATERIALS DISTRIBUTED AND ARE RECKLESS AS TO WHETHER THE MATERIALS CONTAIN VISUAL DEPICTIONS OF SEXUALLY EXPLICIT CONDUCT BY MINORS, BUT MISTAKE OF AGE IS NOT CONSTITUTIONALLY REQUIRED TO BE MADE A DEFENSE TO PROSECUTION UNDER SUCH STATUTES.

The court below also erred in holding that "the First Amendment mandates that a statute prohibiting the distribution, shipping, or receipt of child pornography require knowledge of the minority of the performers as an element of the crime it defines." Pet. 15a. On the contrary, the First Amendment as authoritatively construed by this Court does not require those who traffic in child pornography materials to have actual knowledge that any of the performers whose sexual conduct is depicted in the materials is in fact a minor. Instead, criminal laws aimed at trafficking in child pornography are constitutional if they require that the defendant knows the character and nature of the materials at issue and is reckless as to whether those materials contain visual depictions of sexually explicit conduct by minors.

This conclusion, again, follows directly from the holdings of *Ferber and Osborne*. In *Ferber*, this Court determined that even child pornography materials maintain some protection under the First Amendment, and held that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." 458 U.S. at 765. This requirement was reiterated in *Osborne*, 495 U.S. at 115, but it was not determined in either case that the only constitutional standard of mens rea, was a "knowingly" standard, or that this mens rea must attach to every element of such an offense.

Instead, the Court said two specific things in these cases about the constitutional restrictions on mens rea for child pornography laws. First, borrowing from prior obscenity cases, it approved as constitutionally sufficient the *general* requirement "that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling*, 418 U.S. at 123. In *Osborne*, however, the Court further elaborated that a *specific* mens rea requirement of recklessness would be constitutionally sufficient in child pornography prosecutions, thus requiring not that a defendant must actually know a performer was a minor but that a defendant must at least be reckless as to that fact. The Court squarely held that this mens rea "plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter." 495 U.S. at 115; *see also id.* at 113 n.9.[5]

Accordingly, mistake of age is not constitutionally required to be made a defense to prosecution under state and federal laws designed to protect children against sexual abuse and exploitation, if an appropriate mens rea, such as recklessness, is established. The court below relied on its prior decision in *United States Dist. Ct.*, 858 F.2d at 538-44, which had engrafted such a requirement onto 18 U.S.C. §2251. That decision, however, was rendered before *Osborne* was decided, and therefore was reached without this Court's further guidance on what element of scienter is needed to satisfy the constitutional restrictions identified in *Ferber*. Because of its mistaken construction of 18 U.S.C. §2252, the court below gave only the most passing consideration to *Osborne*, citing it only once, Pet 12a, and not seriously attempting to apply its more detailed analysis in this case. In the wake of *Osborne*, however, it is now clear that the Constitution does not require the courts to engraft any

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[5] As the dissent noted below, this Court has not yet provided any definitive resolution of the issue whether a mens rea weaker than recklessness satisfies the First Amendment in this area. Pet. 27a n.8, as amici would contend, but that issue is not implicated here. *See also supra* note 3.

mistake of age defense onto child pornography statutes. If any such mistake is so profound that it entirely defeats mens rea recklessness, then perhaps it may prevail in exonerating a defendant. But any defendant who knows the general nature of the offending materials, and who proceeds nonetheless with conscious disregard of the risk that such materials constitute child pornography, can properly be punished under this statute or under any similar statute.

If any such restrictive standard were to be imposed as a constitutional requirement, then state and federal efforts to curb the sexual exploitation of children could be severely damaged. For the very reasons identified by the Justice Department in its analysis of this statute when it was first proposed in Congress, "difficult problems of proof" would be posed by any requirement that a defendant must actually know the age of a minor participant, because "in a great many cases the age of the subject will not be readily apparent from an observation of the film or photograph." S.Rep. No. 438, at 28, 1978 U.S.C.C.A.N. at 63. Although the District Court did find such knowledge to be proved beyond a reasonable doubt in this case, Pet. 41a, the general background of the Traci Lords materials at issue this case amply vindicates this concern. *See, e.g., United States Dist. Ct.*, 858 F.2d at 537-43. Thus, as long as traffickers in child pornography were to go about their business with nothing more than a conscious disregard for the nature of such materials, and did not inquire specifically about the precise age of any youthful-looking performers, it would be impossible to prosecute them for trafficking in such materials. No such absurd result is compelled either by the First Amendment itself or by this Court's prior decisions applying it to criminal laws against child pornography.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Petitioner, this Court should reverse the decision of the Court of Appeals for the Ninth Circuit and reinstate the District Court's original convictions of Respondents under 18 U.S.C. §2252.[6]

Respectfully submitted,

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[6] If this Court concludes that there is no constitutional infirmity with the statute, then the proper disposition would be to reinstate the original convictions, since the District Court explicitly found that Respondents did have actual knowledge that the materials at issue in this case depicted the sexually explicit conduct of a minor girl. Pet. 39a, 41a.